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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 45

WILLIAM C. LINN,
Petitioner,
v.
UNITED PLANT GUARD WORKERS OF AMERICA,
LOCAL 114, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER, WILLIAM C. LINN

William C. Linn, Petitioner, prays that the decision of the United States Court of Appeals for the Sixth Circuit in the matter of *Linn v. United Plant Guard Workers of America, Local 114, et al.*, 337 Federal 2d 68, be reversed and that Petitioner's complaint against the Respondents herein be reinstated for trial on the docket of the United States District Court for the Eastern District of Michigan.

OPINIONS BELOW

The memorandum opinion of the District Court is unreported. It is contained in the record at pages 35-37. The opinion of th Court of Appeals is reported at 337 Federal 2d 68 and contained in the record at pages 40-47 thereof.

JURISDICTION

The judgment of the Court of Appeals was entered on October 13, 1964 (R. 46). The petition for certiorari was filed on January 9, 1965, and granted on May 24, 1965 (R. 47; 381 U. S. 923). The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Has Congress so clearly pre-empted the field of labor-management relations and declared it to be in th ational Interest that an individual, who becomes the unfortunate victim of a malicious and vicious libel occurring during the course of a labor relations incident has now completely lost his only effective and historical right of recourse for this most damaging injury to his person?

STATUTES INVOLVED

The particular statutes involved are Sections 7 and 8 of the National Labor Relations Act, as amended. The relevant portions of the statutes are set forth in Appendix A (pages 35 to 40, *infra*).

STATEMENT

This case is before the Court upon grant of a petition for a writ of certiorari to the Court of Appeals for the Sixth Circuit (R. 47). The Court of Appeals had concluded that *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, operated to deny to even a maliciously libeled plaintiff access to the remedies for such injury offered by the courts (R. 40, 41, 45). Rather, held the court, such an injured party must seek such relief, if any there be, that might possibly come from a "cease and desist" order of the National Labor Relations Board (R. 45).

Petitioner Linn filed his civil complaint for damages with the District Court for the Eastern District of Michigan, diversity being the basis for jurisdiction[1] on December 17, 1962 (R. 3). Petitioner stated that he "was at the times involved in 1962 an assistant general manager for the North Central Region of Pinkerton's National Detective Agency, Inc. The complaint charged that during a campaign to organize Pinkerton's employees, * * * United Plant Guard Workers of America, Local 114 and * * * Benton I. Bilbrey, President of the union local and W. T. England, its Vice-President, and one Leo J. Doyle, a Pinkerton guard, conspired to and did utter, publish, circulate and mail written matter maliciously libelling and defaming petitioner Linn" (R. 3-7).

[1] The original complaint failed to properly plead the requisites for diversity jurisdiction. An amended complaint was filed June 7, 1963 alleging necessary jurisdictional facts, (R. 38) and reincorporating the other allegations from the original complaint.

Petitioner Linn specifically charged in his lawsuit that he had been maliciously libelled in the following particulars:

a) In that he was falsely accused of lying to the Pinkerton employees;

b) In that he was falsely accused of lying to the National Labor Relations Board;

c) In that he was falsely accused of withholding from Pinkerton employees their rightfully earned wages;

d) In that he was falsely accused of committing certain criminal acts for which he would be prosecuted (R. 6, 7).

The Appeals Court accepted these statements as being "false, malicious, clearly libelous and damaging to plaintiff Linn, albeit they were relevant to the union's campaign" (R. 41).

Motion to dismiss the complaint was filed by Local 114, Bilbrey and England, the respondents in the matter now before this court.[2] The ground upon which the motion was ultimately granted (R. 39), and affirmed (R. 40, 46), was stated in its third paragraph:

> "• • • The subject matter of both counts of the complaint involve matters relating to the self organization rights and concerted activities of employes under the Labor Management Relations Act of 1947, as amended 29 U.S.C. Sec. 151 *et seq.* All

[2] Doyle, an original defendant in the District Court, did not join in the Motion to Dismiss. As will appear, the motion was granted on behalf only of the respondents here; the action against Doyle yet remains viable in the District Court, presumably to come to issue following disposition of this appeal.

> of the conduct complained of in both counts of said complaint is arguably protected by Section 7 of said statute, or prohibited by Section 8, and is within the exclusive jurisdiction of the National Labor Relations Board" (R. 8).

On December 11, 1962, six days before filing the suit, petitioner's employer (i.e., Pinkerton's) had filed an unfair labor practice charge with the National Labor Relations Board (NLRB) based upon the same scandalous material which formed the basis for petitioner's complaint (R. 13).

The acting Regional Director of the NLRB advised Pinkerton's that after investigation (a hearing was never held), no complaint would be issued. The letter from the NLRB particularized the reason for the decision:

> "The above mentioned charge against United Plant Guard Workers of America, Local 114, was based upon four allegedly objectionable leaflets prepared and circulated by an employee of your company. Such employee was not an officer or member of the charged union, nor was there any evidence that he was acting as an agent of such union. There is no evidence that the union was involved in any respect in the drafting and circulation of the leaflets. In view of the fact that the union is not responsible for the distribution of said leaflets, the charge against the union is wholly without basis" (R. 22, 23).

An appeal from this decision by the local NLRB office was taken to the General Counsel of the Board, by petitioner's employer. The General Counsel sustained the Regional Director, noting that "the evidence disclosed was insufficient to establish that the Union was responsible for the preparation or circulation of the leaflets in question by Doyle, an employee of the Company. In this connection, it was noted that Doyle, who was not a Union member, had

nether real nor apparent authority from the Union to act on its behalf. Under all the circumstances, therefore, further proceedings herein were deemed unwarranted" (R. 34).

Copies of these letters from the NLRB were made available to the District Court by respondent Bilbrey in the form of attachments to several affidavits filed by Bilbrey in support of respondents' pleadings in that Court (R. 22, 33). The District Court referred to and apparently adopted factual conclusions in the Pinkerton unfair labor charge in its memorandum opinion granting the respendents' motion to dismiss as against petitioner Linn (R. 35, 37).[3]

The record indicates the nature of the investigation of the Pinkerton complaint by the NLRB; that is, requests by the NLRB to Pinkerton and the Union for a written account of their respective positions (R. 10, 14) and the submission of an affidavit by Bilbrey to the NLRB (R. 15). There may have been other investigative activities by the Labor Board, but none concerned themselves with petitioner Linn.

As indicated by the docket entries (R. 2), no hearing has ever been held on the substance of petitioner's complaint in the District Court.

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[3] The employer of petitioner, Pinkerton's National Detective Agency, Inc., filed a libel action against the same defendants as did petitioner. The District Court dismissed both the Pinkerton action and the Linn complaint. Pinkerton's took no appeal.

ARGUMENT

INTRODUCTION AND SUMMARY

The position of the Petitioner, Mr. William C. Linn, is, and has been, that he, *as an individual,* has access to the courts to correct and remedy the wrong perpetrated upon him because of a vicious and malicious libel. The fact that Mr. Linn is a supervisor and that the libelous statements were made by Union officials, acting in their official capacity should not operate to give the perpetrators of this wrong what amounts to virtual immunity for the wilful and malicious act of defamation of a man's character. The courts below, in passing upon the question of whether they had jurisdiction to hear such a case, or, was the issue one which had been pre-empted by the National Labor Relations Act to the "exclusive competence" of the National Labor Relations Board, have ruled that they do not have jurisdiction. In this ruling, the lower courts have failed to appreciate the true pattern of the decisions of this Court in earlier pre-emption cases: the lower courts have specifically misinterpreted this Court's decision in *San Diego Building Trades v. Garmon,* 359 U.S. 236.

A maliciously inspired case of libel is neither specifically protected or prohibited by the National Labor Relations Act. It is, however, a specific tort, which all persons are directed not to commit. (No issue of absolute privilege is involved, and for the purposes of this case, a discussion of such is ignored.) Thus, just because such a potentially damaging tort is committed against an *individual* during what the Union claims to be "an organizational campaign," no mantle of protection should be cast over the tortfeasors. To divest from the courts the power to decide the basic

issue of truth or falsity of the utterance when the allegation of such a tort is made under these circumstances, and to substitute for the court, the National Labor Relations Board, is inherently wrong, and can be dangerous. The remedial arsenal of the Board utterly fails to provide any redress for the wounded individual. Because the Board is not necessarily concerned with truth or falsity, as such, it will likely never correct the otherwise irreparable harm. At most, the Board could say, in effect, "Go, and never defame again." To maintain such a Rule of Law cannot be within the intent of Congress. And, because it could open a pandora's box filled with the vilest, most foul and damaging charges and counter-charges, the *peaceful* resolution of actual labor disputes would be well-nigh impossible.

The continued existence of the traditional remedy for malicious libel is necessary to *prevent* such unlawful activity from occurring in the course of any actual "labor dispute" —and further, to prevent any peaceful relationship from becoming a "labor dispute." Both of these ends are desideratums of national labor policy.

I.

THE DOCTRINE OF PRE-EMPTION, AS STATED IN THE GARMON DECISION, IS NOT CONTROLLING IN THIS CASE

A. Possible Import of Decisions Below.

Hard cases make bad law; and this case exemplifies that maxim. Projecting the decisions of the courts below to their logical conclusion, as lawyers often do, *Linn v. United Plant Guard Workers* can be offered as authority for the practical proposition that the Labor Management Relations Act has created privileges even greater than those found in the United States Constitution! This is not so extreme as it might seem. *Garrison v. Louisiana,* 379 U.S.

64, teaches that the knowingly false statement, and the false statement made with reckless disregard of the truth, even in the political arena, do *not* enjoy constitutional protection.

Presumably, a wittingly false statement, deliberately published with malicious intent, which was clearly libelous and damaging, would subject the author to criminal penalties; cf. *Garrison v. Louisiana.* It would certainly provide the basis for a civil action for damages. cf. *New York Times Co. v. Sullivan,* 376 U.S. 254. Yet the rule of *Linn* tells us that if this same thing were done as a *tactic in a Union's organizational campaign,* there is no more to be feared than a *possible* directive from the National Labor Relations Board, commanding that the offensive action not be repeated!

Linn, as of now, says that this is the true import of this court's decision in *San Diego Building Trades Council v. Garmon,* 359 U.S. 236. *Linn* says, in effect, that when this Court said in *Garmon:*

> "When an activity is arguably subject to §7 or §8 of the Act,[4] the States as well as the Federal Courts must defer to the exclusive competence of the National Labor Relations Board of the danger of state interference with National policy is to be averted" (359 U.S. 236, 245),

the Court exempted from the jurisdiction of the state courts *all* of the pre-existing remedies available through those courts for *all* tortious conduct "growing out of and relevant to a Union's campaign to organize the employees of an employer subject to the National Labor Relations Act" (R. 46), with the sole exception of torts involving violence.

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[4] National Labor Relations Act; 49 Stat. 449, as amended; 29 U.S.C. 151 et seq. 157, 158.

B. This Case is not Controlled by Garmon.

We believe that the Court of Appeals has misconceived the real lesson which emerges from those decisions of this Court, which the Court of Appeals cites; viz: *United Construction Workers v. Laburnum*, 347 U.S. 656; *United Auto Workers v. Russell*, 356 U.S. 634; *San Diego Bldg. Trades v. Garmon, supra; Local 100 etc. v. Borden*, 373 U.S. 690; and *Local 207 etc. v. Perko*, 373 U.S. 701.

(1) In *Laburnum, supra*, the Union was sued in a state court for compensatory and punitive damages, based upon the tortious conduct of the Union and its sympathizers in threatening and intimidating the Laburnum Company's employees, to the extent that the Laburnum Company lost certain of its contracts with a resulting loss of profits. It appeared that the Union organized a crowd of rough and boisterous men, some drunk, some armed, and invaded the company's work area. The Laburnum employees were advised that they had to join the Construction Workers Union. Laburnum had previously entered into agreements with another Union. Because of the labor dispute in which the company had become involved, Laburnum's clients and customers canceled their contracts.

Concededly, the Union's activities in *Laburnum* constituted an unfair labor practice under Section 8 of the Act (29 U.S.C. 158). It was argued that the National Labor Relations Board, therefore, had exclusive jurisdiction, and the State Court was pre-empted from granting its relief. This Court answered that contention, saying:

> "If Virginia is denied jurisdiction in this case, it will mean that where the federal preventive administrative procedures are impotent or inadequate, the offenders, by *coercion of the type found here,*

> *may destroy property without liability for the damage done*" 347 U.S. at 669. (Emphasis added.)

The jurisdiction of the State Court was upheld under all the circumstances.

(2) In *Russell, supra,* this Court similarly affirmed a state Court's jurisdiction and award in damages wherein the tortious conduct was also conceded to be an unfair labor practice, subject to §8 of the Act. The unlawful act charged against the Union and its agent was "malicious interference" with an employee's lawful occupation.

The "malicious interference" included blocking the entrance to the plant, threats of bodily harm and damages to an auto. Violence, or the threat of it, was clearly evident.

The principle issue of law facing the Court in *Russell* was whether the State Court had jurisdiction to hear the complaint, or whether the jurisdiction had been pre-empted by Congress, and was vested solely in the N.L.R.B. 356 U.S., 634, 640. The answer to the issue raised was:

> "It is our view that Congress has not * * * deprived a victim of *the kind of conduct* here involved [i.e., threat of violence] of common-law rights of action for all damages suffered" 356 U.S. 634 at 641, 642. (Emphasis added.)

(3) Then in *Garmon, supra,* the question of pre-emption was again raised. In *Garmon,* the California Court awarded damages for economic injuries resulting from *peaceful picketing by Unions which had not been selected as bargaining agents.* These activities, it was found,

> "constituted a tort based on an unfair labor practice under state law. In so holding the [California] Court relied on general tort provisions of the Cali-

> fornia Civil Code * * *, as well as state enactments dealing specifically with labor relations" 359 U.S. 236, at 239.

State jurisdiction to award damages for *this type of tortious conduct* was found to have been extinguished by the National Labor Relations Act. The Labor Board was held to have primary jurisdiction in this kind of situation. The *Garmon* Court carefully pointed out that state jurisdiction was allowed to prevail in *Laburnum* (and *Russell*) because of the "type of conduct" present in *those* cases. It necessarily follows that the decision in *Garmon* that state jurisdiction was pre-empted was occasioned by the *type of conduct* described by the set of facts there presented.

(4) In the *Borden* case, *supra,* state jurisdiction to award damages was held to have been pre-empted where a Union member claimed to have been barred from a particular job because a Union business agent refused to refer him to a particular bank construction project. (The member was referred to, and did obtain employment on, other construction projects, however.) This Court held that

> "the first inquiry, in any case in which a claim of federal pre-emption is raised, must be whether the *conduct* called into question may reasonably be asserted to be subject to Labor Board cognizance" 373 U.S. 690 at 694. (Emphasis added.)

The conduct which Borden claimed to constitute a tortious interference with his right to work could have been (1) a violation of §8(b)(1)(A) of the Act, in that the Union agent restrained Borden from exercising his Section 7 right to refrain from observing the Union's rules; or (2) a violation of Section 8(b)(2), by causing a prospective employer to discriminate against Borden; or (3) concerted

Union activity protected by Section 7 of the Act. But in any event, Borden's claim for damages "was focused principally, if not entirely, on the Union's actions with respect to Borden's efforts to obtain employment." (373 U.S. 690 at 697.)

The opinion of the Court concluded by stating:

> "In the present case the *conduct* on which the suit is centered, whether described in terms of tort or contract, is conduct whose lawfulness could initially be judged only by the federal agency vested with exclusive primary jurisdiction to apply federal standards" 373 U.S. 690 at 698. (Emphasis in original.)

(5) Continuing, in *Local 207 v. Perko, supra,* state jurisdiction to award damages was once again found to have been pre-empted. Perko was employed by Pollack Company as a "foreman" or a "supervisor." He was also a member of Local 207 of the Iron Workers Union (i.e., the petitioner). Because of certain activities of Mr. Perko, an inter-union jurisdictional dispute arose and the Iron Workers members would not work for Perko. Perko was laid off because of his dispute with his Union. Thereafter, Perko did not obtain employment as a foreman or as a superintendent.

In the factual context presented, the Union's activities in causing Perko's discharge and preventing his re-employment as foreman or superintendent were likely a violation of either Section 8(b)(1)(A)—a coercion of Perko for failure to live up to a Union rule; or a violation of Section 8(b)(2)—causing the employer to discriminate against Perko; or a violation of several other unfair practices prescribed by Section 8. Whatever violation the activities might have been, as the Court pointed out, the Labor Board could have provided an adequate remedy.

Returning to *Local 100 v. Borden, supra,* for a moment, the Court in that case profoundly noted:

> "It is not the label affixed to the Court of action under state law that controls the determination of the relationship between state and federal jurisdiction. Rather, as stated in *Garmon*, 359 U.S. at 246, '(o)ur concern is with delimiting *areas of conduct* which must be free from state regulation if national policy is to be left unhampered' " 373 U.S. 690 at 698. (Emphasis added by Court in principal citation.)

The Court has up to now "delimited" only certain areas of conduct. Violence has been ruled on in *Laburnum* and *Russell*, as well as in other cases. See, e.g., *Youngdahl v. Rainfair*, 355 U.S. 131. Peaceful picketing for Union recognition has been ruled on in *Garmon*. Direct interference with obtaining employment was the subject of *Borden* and *Perko*. Peaceful picketing to force hiring of Union labor was considered in *Local 438 v. Curry*, 371 U.S. 542. This is not necessarily an all-inclusive list of the areas of conduct considered in the cases as "delimited" for pre-emption purposes. But the fact remains that *malicious libel and defamation* has never been ruled on as an "area of conduct." That question faces the Court in this matter.

C. Standards For Deciding This Case.

The point we are striving to make is that *Garmon* is not the end of the pre-emption road. Nor does *Garmon* state the totality of the pre-emption doctrine. *Garmon* dealt with a particular set of facts wherein the unlawful activity for which money damages were assessed was *inherently* an unfair labor practice. Likewise, in *Borden* and *Perko* the unlawful activity was *inherently* an unfair labor practice. The *focus* of the remedies sought in those cases was directly on the regulation of labor-management relations. Money damages, though sometimes significant in amount, were essentially ancillary to the respective actions.

The opposite is true of the factual postures in *Laburnum* and *Russell.* Money damages for real injuries were th principal *focus* of those lawsuits. If there was any effect upon labor-management relationship, it was a coincidence arising out of the circumstance that the defendant composed one part of that relationship. But the central fact remained that the wrongful act could have been perpetrated with any cast of characters. It did not need a labor-management incident to give it birth.

The true distinction, then, between the *Laburnum-Russell* line of cases on the one hand, and the *Garmon-Borden-Perko* line on the other, is the distinction suggested by the then professor Archibald Cox writing in the Harvard Law Review in 1954:

> "May we not say therefore, that the distinction [pre-emption vis.-a-vis. no pre-emption] should be drawn between statutes and rules of decision having general application and laws which deal with labor-management relations *as such?* (Emphasis in original.) (Cox, *Federalism in the Law of Labor Relations,* 67 Harv. Law Rev. 1297, at 1321.)

Obviously, a civil action for defamation is based upon codes of conduct imposed upon *all* persons. The actions in The civil actions in *Laburnum* and *Russell* were based upon codes of conduct imposed upon *all* persons. The actions in *Garmon-Borden-Perko* had a different genesis; they grew out of—*and could only grow out of*—some intereference with the employer-employee relationship.

The true lesson of these cases, which the Court of Appeals has not applied to the situation presented here, is this:

1. State courts continue to maintain their historic power to redress and remedy injuries caused to citizens by those acts of commission or omission which are con-

trary to the general code of behavior, established to provide peace and good order among its citizens, without regard to the fact that such injury might also—in another context—be an unfair labor practice.[5]

2. But where an injury is caused by a wrong which wrong is *by definition* an unfair labor practice, the primary jurisdiction to ameliorate the harm lies with the National Labor Relations Board.

Applying the foregoing "lesson" as a standard for determining the issue presented in this matter, the answer is clear: Because an action for maliciously concocted libel is based upon a standard of conduct imposed on everyone, the State Courts (although in this instance, a Federal Court, because of diversity) are not pre-empted from jurisdiction to hear, and decide, a complaint alleging malicious libel, even though the parties to the lawsuit happen to be on opposite sides of the labor-management arena.[6]

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[5] Especially does this hold true when the proscribed acts are maliciously inspired and calculated to do harm; i.e., to injure or destroy person or property. The Court will remember that maliciousness is specifically alleged in petitioner Linn's complaint.

[6] Honeesty prompts this comment at this point. Perhaps most of the foregoing is an unduly legalistic approach to a question best presented in terms of common sense and fundamental concepts of fairness. As a very practical matter, no true personal injury, as that term is understood in the traditional common-law concept of the law of torts, can ever be considered by decent people to be "a proteced activity under §7 of the National Labor Relations Act." The underlying precepts to the national labor policy which Congress has legislated—as either stated or implied in §1 of the National Labor Relations Act (29 U.S.C. 151)—are fairness of treatment, respecting the rights of the opposition, protection against strife, equations of respective positions.

By the same token all true personal injuries, as hazily defined above, when committed in the course of labor-management incident, or at any other time for that matter, *must* be "unfair labor practices". Relieving a tortfeasor from liability for causing such injuries has to depend upon

(Continued on next page)

II.

MALICIOUS LIBEL IS NOT A PROTECTED CONCERTED ACTIVITY

The District Court based its order of dismissal "for want of jurisdiction of the subject matter as to [respondents] United Plant Guard Workers of America, Benton I. Bilbrey and W. T. England" (R. 39) upon the grounds that the "false and defamatory publication * * * would arguably constitute an unfair labor practice under Section 8(b) of the National Labor Relations Act * * *". And the Circuit Court's opinion (R. 40-47) inferentially agreed with this holding. This District Court in its opinion, however, did quote that paragraph from the *Garmon* decision which includes the "protected by Section 7" phrase (359 U.S. 236 at 244) (R. 36), although the lower court did not appear to consider the activities in this case as "protected."

In his memorandum, in response to the Court's invitation of March 8, 1965, to file a brief expressing the views

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(Continued from preceding page)

some Rule of Law other than the artificial standard of simply being "arguably subject to the Act."

Should we abandon these general principles, we are no longer a nation under law, dedicated to the rule of law and rights of man; when we abandon these general principles, we become subject to a government of men.

While the foregoing is not particularly sophisticated, it is not for that reason, unsound.

There comes a point in time and in every society when the "National Interest" is no longer best served by subjugation of the interests of the individual. We suggest that restrictions, such as have been so far sanctioned in *this case*, against protection of an individual's personal honor, reputation, and integrity, is that point.

Due respect for the Forum to which we address this brief compels us to make this argument in a footnote. But with all sincerity, we believe in its application to the case at hand.

of the United States, the Solicitor General nevertheless suggested that a statement defamatory under state law might be protected by Section 7 of the Act. (Memorandum for the United States, this case, p. 4). The respondents do not seem to agree that libel is "protected activity" (Reply by Respondents to Memorandum for United States, this case, p. 2) nor do we on behalf of petitioner, Mr. Linn.

The legislative history of Section 7 of the Taft-Hartley Act likewise does not support any "protected" theory for defamation. The purpose for and the underlying philosophy of Section 7 of the Act is fully stated in the report of the House and Senate conferees, after the representatives of those two bodies had met to iron out the differences between the Hartley Bill in the House (H.R. 3020, 80th Cong. 1st Sess.) and the Taft Bill in the Senate (S. 1126, 80th Cong., 1st Sess.). The Conference Committee reported on what was to be enacted as Section 7 of the National Labor Relations Act [29 U.S.C. 157], as follows:

> "*Rights of Employees.*
>
> "Both the House Bill and the Senate amendment in amending the National Labor Relations Act preserved the right under section 7 of that act of employees to self-organization, to form, join, or assist any labor organization, and to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. The House bill, however, made two changes in that section of the act. *First,* it was stated specifically that the rights set forth were not to be considered as including the right to commit or participate in unfair labor practices, *unlawful concerted activities,* or violations of collective bargaining contracts. *Second,* it was specifically set forth that employees were also to have the right to refrain from self-organization, etc., if they chose to do so.

"The first change in section 7 of the act made by the House bill was inserted by reason of *early* decisions of the Board to the effect that the language of section 7 *protected concerted activities regardless of their nature or objectives.* An outstanding decision of this sort was the one involving a 'sit down' strike wherein the Board ordered the reinstatement of employees who engaged in this un[l]awful activity. Later the Board ordered the reinstatement of certain employees whose concerted activities constituted *mutiny.* In both of the above instances, however, the decision of the Board was *reversed* by the Supreme Court. More recently, a decision of the board ordering the reinstatement of individuals who had engaged in mass picketing was reversed by the Circuit Court of Appeals (*Indiana Desk Co. v. N.L.R.B.,* 149 Fed. (2d) 987) (1944).

"Thus the *courts* have *firmly* established the rule that under the *existing provisions of section 7* of the National Labor Relations Act, employees are *not* given any right to *engage in unlawful or other improper conduct.* In its most recent decisions the Board has been consistently applying the principles established by the courts. For example, * * *. [Four specific illustrations are given here.] The reasoning of these recent decisions appears to have had the effect of overruling such decisions of the Board as that in *Matter of Berkshire Knitting Mills* (46 *N.L.R.B.* 995 (1943)), wherein the Board attempted to distinguish between what it considered as major crimes and minor crimes for the purpose of determining what employees were entitled to reinstatement.

"By reason of the foregoing, it was believed that the specific provisions in the House bill excepting unfair labor practices, *unlawful* concerted activities, and violation of collective bargaining agreements from the protection of section 7 were *unnecessary.* Moreover, there was real concern that the *inclusion*

of such a provision might have a *limiting* effect and make *improper conduct* not specifically mentioned *subject* to the *protection* of the act.

"In addition, other provisions of the conference agreement deal with this particular problem in general terms. For example, in the declaration of policy to the amended National Labor Relations Act adopted by the conference committee [29 U.S. Code §151, fourth paragraph], it is stated in the new paragraph dealing with improper practices of labor organizations, their officers, and members, that the 'elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.' This in and of itself demonstrates a clear intention that these undesirable concerted activities are *not* to have any protection under the act, and to the extent that the Board in the past has accorded protection to such activities, the conference agreement makes such protection *no longer* possible. Furthermore, in section 10 (c) [29 U.S.C. 160 c] of the amended act, as proposed in the conference agreement, it is specifically provided that no order of the Board shall require the reinstatement of any individual or the payment to him of any back pay if such individual was suspended or discharged for cause, and this, of course, applies with equal force *whether or not* the acts constituting the cause for discharge were committed in connection with a *concerted activity.* Again, inasmuch as section 10 (b) [29 U.S.C. 160 b] of the act, as proposed to be amended by the conference agreement, requires that the rules of evidence applicable in the district courts shall, so far as practicable, be followed and applied by the Board, proof of acts of unlawful conduct cannot hereafter be limited to proof of confession or conviction thereof.

"The second change made by the House bill in section 7 of the act (which is carried into the conference agreement) also has an important bearing

> on the kinds of concerted activities which are protected by section 7. That provision, as heretofore stated, provides that employees are also to have the right to refrain from joining in concerted activities with their fellow employees if they choose to do so. Taken in conjunction with the provisions of section 8 (b) (1) of the conference agreement (which will be hereafter discussed), wherein it is made an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of rights guaranteed in section 7, it is apparent that many forms and variet[i]es of *concerted* activities which the Board, particularly in its *early* days, regarded as *protected* by the act will *no longer* be treated as having that protection, since obviously persons who engage in or support unfair labor practices will not enjoy immunity under the act." (Emphasis supplied.) (H.R. Rep. 510, 80th Cong., 1st Session, pp. 38-40, 1 Leg. Hist. L.M.R.A. 542-544.)

Senator Taft, one of the conferees, reported to his colleagues in the Senate and presented a detailed summary of the differences between the original Senate bill and that which emerged from the Conference Committee. His remarks, on June 5, 1947, appear at 93 Cong. Rec. 6441-5, and in 2 Legislative History of the Labor Management Relations Act 1536-44. The Senator said, in part, concerning Section 7:

> "By reason of the foregoing, it was believed that the specific provisions in the House bill excepting unfair labor practices, unlawful concerted activities, and violation of collective-bargaining agreements from the protection of section 7b [sic] were unnecessary. Moreover, there was a fear that the inclusion of such a provision might have a *limited* [limiting] effect and make unlawful activities *other* than those *specifically* mentioned *subject* to the *protection* of act. Other provisions of the conference

agreement deal with this particular problem in general terms. For example, in the declaration of policy to the new National Labor Relations Act adopted by the conference committee, it is stated with reference to undesirable practices of labor organizations, their organization, their officers, and members that the 'elimination of such practices is a necessary condition to the assurance of the rights herein guarteed.' *This demonstrates a clear intention that these undesirable concerted activities are not to have any protection under the act,* and to the extent that the Board in the past has accorded protection to such activities, *the conference agreement makes such protection no longer possible.* Furthermore, in section 10 (c) [29 U.S.C. 160 c] as proposed in the conference agreement, it is specifically provided that no order of the Board shall require the reinstatement of any individual or the payment to him of any back pay is such individual was suspended or discharged for cause." (Emphasis supplied.) (2 Legis. Hist. L.M.R.A. p. 1539).

Subsequently, Section 7 of the Act (29 U.S.C. 157) was passed by Congress, as the Committee proposed, and in the following form:

> "Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)."

The reports and remarks quoted above thus make it unmistakably clear that Section 7 of the N.L.R.A. shall never be construed to protect *unlawful* activity, whether that activity be "concerted" activity or otherwise. It is furthermore unmistakably clear that *unlawful* conduct was not to be defined solely in terms of the unfair labor practices otherwise defined in the act. The Report to the House speaks in terms of unfair labor practices, unlawful activities and violation of collective bargaining agreements, and then indicates, in the fourth paragraph of the portion of the Report quoted above, that these terms are to have a broad interpretation and are not to be limited to such improper conduct as is specifically mentioned in the Act itself. There is likewise no doubt that, in Michigan, where the cause of action arose, the false and malicious imputation of criminal conduct in another is *unlawful. Line v. Spies,* 139 Mich. 484 (1905). Not only does such activity give rise to a civil action for damages, it is also, in Michigan, a crime. See, Michigan Comp. Laws '48, §750.370; M.S.A. 28.602.

We submit, therefore, that any suggestion that the *type of conduct,* as described in the Complaint filed in this matter, is protected activity under Section 7 of the Act, is palpably in error.

III.

LIBEL, AS SUCH, IS NOT AN UNFAIR LABOR PRACTICE

In a case in which federal pre-emption of the subject matter is raised as an issue, as did the respondents here, the first inquiry must be whether the conduct in question may be reasonably asserted to be subject to National Labor Relations Board Cognizance, *Local 100 of United Ass'n of Journeymen and Apprentices v. Borden,* 373 U.S. 690.

That is to say, is the conduct complained of *prohibited* by Section 8, or *protected* by Section 7 of the Act? We have demonstrated that a malicious libel imputing crime, because it is an *unlawful* activity, cannot be considered protected by the Act.

Insofar as the prohibited activities are concerned, we urge the Court to give literal meaning, in this case, to Section (c) of the Act (29 U.S.C. 158 (c)). In full, 8 (c) says:

> "*The expressing of any views*, argument, or opinion, or the dissemination thereof, whether *in written*, printed, graphic, or visual *form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act*, if such expression contains no threat of reprisal or force or promise of benefit." (Emphasis added.)[7]

Here, in express and unequivocal language, Congress has stated what *shall not be* an unfair labor practice, cognizable as such by the National Labor Relations Board, namely: *words*. It should go without saying that the Board is not a court of general jurisdiction over private rights. *Guss v. Utah Labor Relations Board*, 373 U.S. 1, (dissenting opinion). When it was created by Congress in the National Labor Relations Act, (49 Stat. 449, as amended, 29 U.S.C. 151 *et seq.*), the National Labor Relations Board was given specific powers and duties. Among those powers and duties is the prevention of any person from engaging in those unfair labor practices listed in Section 8 of the Act. (See generally, §10 of the Act, 29 U.S.C. 160). But, by the specific terms of Section 8 (c), the use of words *is not* an unfair labor practice. *Words* are not then "argu-

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[7] Threats of reprisal, etc., are not contained in the libelous document and are not of concern in the instant case.

ably subject to Section 8 of the Act." *San Diego Building Trades v. Garmon, supra.* To put the proposition another way, the use of words *is not* such activity which may reasonably be asserted to be subject to Labor Board cognizance, cf. *Local 100 etc. v. Borden,* 373 U.S. 690, 694.

The legislative history of 8 (c) indicates that in the context of the instant case, an action based upon a malicious libel *is not* such an instance where the Labor Relations Act "leaves much to the states, though Congress hes refrained from telling us how much." *Garner v. Teamsters Union,* 346 U.S. 485, 488. On the contrary, the legislative history of Section 8 (c) of the Act conclusively demonstrates that this Section was added to the Law *to eliminate from the Labor Board's cognizance*—and as an unfair labor practice—*speech. Cf. Local 100 v. Borden, supra.*

House Report No. 245, on House Bill 3020, dated April 11, 1947 (H.R. Rep. No. 245, 80th Cong. 1st Sess., p. 33, 1 Leg. History, L.M.R.A. 324) concerning that part of the legislation which ultimately became Section 8 (c) of the Labor Act, reads:

> "Section 8 (d) (i).—This guarantees free speech to employers, employees, and unions. Although the Labor Board says it does not limit free speech, its decisions show that it uses against people what the Constitution says they can say freely. Thus, if an employer criticizes a union, and later a foreman discharges a union official for gross misconduct, the Board may say that the official's misconduct warranted his being discharged, but infer, from what the employer said, perhaps long before, that the discharge was for union activity, and reinstate the official with back pay. It [i.e., the Labor Board] has similarly abused the right of free speech in abolishing and penalizing unions of which it disapproved but which workers wished as their bar-

gaining agents. *The bill corrects this,* providing that nothing that anyone says shall constitute or be evidence of an unfair labor practice unless it, by its own express terms, threatens force or economic reprisal. This means that a statement may not be used against the person making it, unless it, standing alone, is unfair within the express terms of Sections 7 and 8 of the amended Act." (Emphasis supplied.)

Almost contemporaneously the Senate Report, concerning its version of the original 1947 Amendments to the Labor Act, was published. In support of the need for what was to ultimately become Section 8 (c), the Senate Report said:

"Section 8 (c): Another amendment to this section would insure both to employers and labor organizations full freedom to express their views to employees on labor matters [provided that they] refrain from threats of violence, intimation of economic reprisal, or offers of benefit. The Supreme Court in *Thomas v. Collins* (323 U.S. 516) held, contrary to some earlier decisions of the Labor Board, that the Constitution guarantees freedom of speech on either side in labor controversies and approved the doctrine of the *American Tube Bending* case, (134 F2d 993). The Board has placed a limited construction upon these decisions by holding such speeches by employers to be coercive if the employer was found guilty of some other unfair labor practice, even though severable or unrelated (*Monumental Life Insurance,* 69 N.L.R.B. 247) or if the speech was made in the plant on working time (*Clark Brothers,* 70 N.L.R.B. 60). The committee believes these decisions to be too restrictive and, in this section, provides that if, under all the circumstances, there is neither an expressed or implied threat of reprisal, force, or offer of benefit, the

Board shall not predicate any finding of unfair labor practice upon the statement. The Board, of course, will not be precluded from considering such statements as evidence." (Senate Report No. 105, 80th Cong. 1st Sess. pp. 23, 24, April 17, 1947; 1 Leg. Hist. L.M.R.A. 429-430.)

Subsequently, as the Court knows, the House and Senate versions of the 1947 Labor Act were submitted to Conference Committee. On June 3, 1947, the Conference Committee's explanation on what has now become Section 8 (c) was issued:

"(5) Both the House bill and the Senate amendment contained provisions designed to protect the right of both employers and labor organizations to free speech The conference agreement adopts the provisions of the House bill in this respect with one change derived from the Senate amendment. It is provided that expressing any views, argument, or opinion or the dissemination thereof, whether in written, printed, graphic, or visual form, is not to constitute or be evidence of an unfair labor practice if such expression contains no threat of force or reprisal or promise of benefit. The practice which the Board has had in the past of using speeches and publications of employers concerning labor organizations and collective bargaining arrangements as evidence, no matter how irrelevant or immaterial, that some later act of the employer had an illegal purpose gave rise to the necessity for this change in the law. The purpose is to protect the right of free speech when what the employer says or writes is not of a threatening nature or does not promise a prohibited favorable discrimination." (H.R. Conf. Rep. No. 510, 80th Cong. 1st Sess. p. 45, 1 Leg. Hist. L.M.R.A 549)

Senator Taft then reported to his colleagues in the Senate, on June 5, 1947, concerning the Conference Committee's report, as follows:

> "Subsection (c) relating to the right of employers, employees, and labor organizations to express opinions and views freely, conforms substantially with the language of subsection 8 (d) (1) of the House bill and is a substitute for Section 8 (c) of the Senate amendment The House conferees were of the opinion that the phrase 'under all the circumstances' in the Senate amendment was ambiguous and might be susceptible of being construed as approving certain Board decisions which have attempted to circumscribe the right of free speech where there were also findings of unfair labor practices. Since this was certainly contrary to the intent of the Senate, as the accompanying report of the committee with respect to this subsection indicates, the Senate conferees acceded to the wish of the House group that the intent of this Section be clarified." (2 Leg. Hist. L.M.R.A. 1540-1541.)

What then clearly appears as the sense of the Congress is a delimiting of an area of conduct *which must be free from National Labor Relations Board* regulation. cf. *San Diego Building Trades v. Garmon,* 359 U.S. 236, 246. That is to say (with certain specific exceptions not here applicable) *speech is not pre-empted to the "exclusive competence" of the Labor Board."* 359 U.S. at 245.

And, since "Congress could pre-empt as much or as little of this interstate field as it chose," *Retail Clerks International Ass'n v. Schermerhorn,* 375 U.S. 96, 99, it would torture the pre-emption doctrine to now find that a *specific denial of pre-emption* withdraws from the States the jurisdiction of their courts to hear a cause based upon a faleshood, deliberate and calculated, or made with reck-

less disregard of the truth. Such a statement bears no protection from a libel action in the political arena, *Garrison v. Louisiana,* 379 U.S. 64, and we can see no sound reason for sanctioning such a statement in the area of labor relations.

IV.

RETAINING IN THE LOCAL COURTS THE JURISDICTION TO HEAR AND DECIDE CIVIL ACTIONS BASED UPON MALICIOUS LIBEL CONSTITUTES NO THREAT TO NATIONAL LABOR POLICY OR THE NATIONAL LABOR RELATIONS BOARD

A. The Courts and the N. L. R. B. Have Different, Non-Competing Interests.

The Fourth Circuit Court of Appeals stated the reason for the fundamental soundness of the above proposition in *Bouligny v. Steelworkers* (1964) 336 F. 2d 160, (cert. granted on another issue, 370 U.S. 958). Through Judge Bell, the court there said:

> "'The National Labor Relations Act is concerned only with the *coercive* effect of an alleged libel, and not with its character as a common law tort." (336 F2d 160 at 165.) (Emphasis supplied.)

That is, the National Labor Relations Board is not basically concerned with the truth or falsity of any given statement. (Query whether the Board is, under most circumstances, legitimately concerned with any statement. See argument advanced re: §8 (c), above). The concern of the Labor Board is whether there has been an unfairly coercive or restraining influence inserted into the context of a particular labor-management dispute. (Or, whether the complained of conduct is protected; but if protected,

it cannot, by definition, be unfair. As demonstrated earlier, the conduct *here* complained of is not protected.) The concern would have to be with the statement itself, and not with its veracity. See, Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act,* 78 Harv. Law Rev. 38, at 82-91.

On the other hand, "the major purpose of libel actions is the vindication of the individual's interest in his reputation" Note, 78 Harv. Law Rev. 1670 at 1673. The touchstone of this interest *is* truth or falsity. And this central issue can be determined in the libel action "without regard to the merits of the labor controversy." See, *International Union v. Russell,* 356 U.S. 650 at 649 (dissenting opinion). The areas of inquiry by the two tribunals, i.e., the N.L.R.B. and the Court—are not necessarily likely to overlap. Indeed, by the very nature of the desired end product of the inquiry they are very likely to run at right angles to each other. Even the element of damages in the civil defamation suit is often a secondary issue. Restoration and continuation of the good personal name and reputation of the victim is, many times, the central purpose of the lawsuit.

It follows then that because of these two basically and distinctly different interests, there can be no real interference with national policy in allowing the local courts to retain their traditional jurisdiction to hear causes based upon an allegation of malicious libel, as is the charge in this case. We suggest the fact to be that, in this area, there cannot even be the possibility of two separate tribunals coming to two separate and competing conclusions based upon the same set of facts. For, if the Labor Board has to decide the question of restraint or coercion, and degree thereof, it obviously will have no relationship to

a trial court's conclusions as to truth or falsity. And the opposite is equally true: A trial court's determination concerning veracity of a particular statement should not affect the broader question of restraint and/or coercion before the Board.[8] In short, the conclusions of the respective tribunals cannot compete because they are not deciding the same issues.

B. Upholding the Rule of the Lower Courts Could Seriously Impair Labor Relations Generally.

It should be emphasized here that because of the factual background of this case, the precise question now before the Court is whether an *individual* can maintain a course of action because of a malicious libel perpetrated in the course of a labor relations incident.[9] Not only does the National Labor Relations Board fail to have an appropriate remedial weapon in its arsenal under these circumstances but, we strongly urge that denying the courts jurisdiction to hear a case *of this nature* would have the net effect of undermining the national policy. That policy is stated in Section 1 (b) of Labor Management Relations Act of 1947 (61 Stat 136; 29 U.S.C. 141 (b)):

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[8] As a practical matter, proceedings before the National Labor Relations Board in any given situation are likely to be concluded long before the end to any civil action pending in a trial court. And since the defamation action can be "decided without regard to the merits of the Labor controversy" *UAW v. Russell, supra*, it is not likely that the "old wounds" of the dispute will be kept open.

[9] As indicated earlier in the Statement of the case, the employer of the petitioner also filed a complaint because of the same libelous statements claiming damages to the employer. This action was dismissed in the District Court and was not appealed. (R. 35-39)

"SHORT TITLE AND DECLARATION OF POLICY

Section 1. (a) This Act may be cited as the "Labor Management Relations Act, 1947."

(b) Industrial strife which interfers with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce."

By failing to allow a competent court to ascertain the truth where an individual has been libeled, a situation is created analogous to the failure to provide compensation for crippling injuries caused by an industrial accident, an inequity which has been corrected in many states by Workmen's Compensation laws. It does not require extended argument to point out that unless some remedy is provided

for the crippling injury, a festering malcontent will lie within the injured party. The animus will most certainly be directed towards the thing (e.g., the Company) considered by the individual to be responsible for the harm. And the same will hold true for the unredressed libel. Human beings, being what they are, will always retain an area of doubt about a person who has been villified and who has not corrected his accusers. Now, we are told by the lower courts, there is no effective way that such a challenge can be made in the labor-management context. Then, can it reasonably be said that where a supervisor's personal conduct and morals have been challenged and he is prevented from showing the falsity of the accusations, that industrial strife will be minimized? The answer is obviously: NO. Because in such a situation, two results can be reasonably expected: (1) the supervisor will retain an animus toward his accusers (and if the accusers be Labor, no sound labor-management relationship can be expected) and (2) the supervisor will certainly lose whatever power and respect he might have, need and enjoy to carry out his supervisor's responsibilities.

The situation would be the same if the libeled individual was a Union official and the degrading statement came from the management side. We argue for no distinction between the rights, responsibilities and remedies available to the parties. We do argue for a recognition that a civil action for damages is the most effective preventative against the maliciously inspired libel. And we argue that maliciously inspired libel has absolutely no place in any phase of our society. It certainly has no place in the labor-management relationship; a relationship characterized by the Respondents as one which is "often close to violence" (Brief in Opposition to Petition for Certiorari, p. 7). It may, therefore, reasonably be asserted that failure to

recognize the traditional cause of action for malicious libel, in the labor management relationship, could actually undermine the very policies which Congress has sought to promote. Cf. *Meyer v. Teamsters*, 416 Pa. 401, 206 A2d 382 (petition for certiorari pending). It may further be asserted that there is no sound, demonstrated need to preempt state jurisdiction in this area. Nor is there any clearly expressed Congressional direction depriving the states of the power to act.

CONCLUSION

The judgment of the Court of Appeals should be reversed and the case should be remanded to the District Court for reinstatement on the trial docket.

Respectfully submitted,

DONALD F. WELDAY,

DONALD F. WELDAY, JR.,
Northland Towers,
Southfield, Michigan.

WELDAY, O'LEARY, GOLDSTONE & BICHAN,
Of Counsel.

September 15, 1965.

APPENDIX A

SHORT TITLE AND DECLARATION OF POLICY

Section 1. (a). This Act may be cited as the "Labor Management Relations Act, 1947."

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

NATIONAL LABOR RELATIONS ACT

FINDINGS AND POLICIES

Section 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

DEFINITIONS

Sec. 2. When used in this Act—

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

RIGHTS OF EMPLOYEES

Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Section 8:

* * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

* * *

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

PREVENTION OF UNFAIR LABOR PRACTICES

Section 10. (a) The Board is empowered, as hereinafter provided to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer of labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging

a violation of section 8 (a) (1) or section 8 (a) (2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.